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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. ~~1693~~ 70-156

FERNANDO R. ESCUTE,
Petitioner.

vs.

GERARDO DELGADO, WARDEN, PENITENTIARY OF PUERTO RICO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above entitled case on March 10, 1971.

CITATION TO OPINIONS BELOW.

The order of the United States District Court is unreported and is printed in Appendix A hereto. The opinion of the United States Court of Appeals is printed in Appendix B hereto.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 10, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

Is it constitutionally permissible for the government in a criminal case to obtain decisive trial evidence from an accused through the agency of a prosecutor who is acting in the dual capacities of prosecutor and judge, who swears an accused person as a witness, then interrogates him without benefit of defense counsel?

Is a conviction obtained in violation of *Jackson* v. *Denno* constitutionally supportable where the defendant's trial evidence sets forth a substantial claim of involuntariness?

STATUTORY AND CONSTITUTIONAL PROVISIONS.

The statutory provisions involved are Sections 13 and 44a, Code of Criminal Procedure of Puerto Rico (1935).

SECTION 13: The following persons are magistrates:

(1) The justices of the Supreme Court.
(2) The judges of the district court.
(3) Justices of the peace.
(4) Prosecuting attorneys.

SECTION 44a: In all warrants of arrest the amount of bail shall be fixed and said bail may be taken and admitted by any judge, prosecuting attorney, or clerk of court.

The constitutional provision involved is Amendment 14, Section 1, United States Constitution: "No state shall make or enforce any law which will abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT.

Petitioner herein was charged with the murder of a man who was killed on a beach in Puerto Rico in 1943. At that time the petitioner was 19 years old. He pled not guilty and the case proceeded to trial in January, 1944. The only psychological testimony presented in the case relating to the accused established that this 19-year-old defendant had the mental capacity of a person eight years of age. His I.Q. was 50. This testimony was given by Alfred Silva, a qualified psychologist and Professor of Psychology at the University of Puerto Rico. Dr. Silva's qualifications included a degree from Columbia University and clinical experience including psychological examination of between 1,500 and 2,000 persons. He tested the accused. Professor Silva was asked about the defendant's ability to understand anything concerning his rights, or the rights of persons accused of crime. The trial record reflects Professor Silva's reply: "I have made a study on the basis of the defense which suggested this phraseology to me and I find that this language is beyond Fernando Rivera-Escute's understanding. There are words like 'murder in the first degree', 'consisting', 'whose', 'is unknown', 'unlawfully killed', 'such defendant', 'felony', 'warning him', 'is under the obligation', 'testify', 'testimony', 'used against you', 'free, voluntary, spontaneous statement', 'duress', 'threats', 'intimidation', 'promise', 'condition as a defendant', and it is my opinion, Your Honor, that those words are beyond the defendant's understanding capacity."

The prosecutor asked Professor Silva to elaborate:

> Q. (By Prosecutor) "If he is told 'If you testify, your testimony may be used against you at the trial', would he understand that?"
>
> A. (By Professor Silva) "I think he would not understand it."

No controverting medical or psychological testimony was presented by the prosecution.

Pitted against this defendant during the time the defendant was in pretrial custody and the government was building its case against him was a trained trial attorney, the Assistant Prosecuting Attorney of the District Court of San Juan. The prosecutor achieved a confession from the accused, which confession was a decisive item of evidence against the accused. Indeed, beyond the defendant's own admissions there was sparse evidence connecting him with the crime. The circumstances under which the prosecutor obtained this decisive item of evidence are remarkable. It is uncontroverted that after he was taken into custody the defendant was locked in a cage in a room of detectives. This information was provided by a leading prosecution witness, one Porfirio Vega, Chief of the Detective Bureau of Puerto Rico. Apparently detective Vega gave an order that defendant was to be locked in the cage and no detective was to "have anything to do with him." The trial record describes the scene:

> Q. (By defense counsel) "Can't the witness assure the Court whether in spite of having given that order any person there had anything to do with the defendant?"
>
> A. (By detective) "I can't assure whatever was done with him in my absence."
>
> Q. "Describe the cage, as it was on July 21."
>
> A. "If we take this room as an example—it has more or less the same shape as the room of the detectives in Santurce—the cage is in the left corner. When you enter that room—which is a room for the detectives—the cage is in the forward corner. The cage is made of wood or wooden planks four inches wide and an inch thick. Such planks come from the ceiling down to the floor. It's a rather comfortable cage and it could hold six or eight people. It has a door and a padlock

and key, one of which keys is under the custody of the detective on duty."

Q. "Where did the defendant sleep?"

A. "In the same cage in which there are two benches."

Controverted evidence did go to the defendant's assertion that he was brutalized. On cross-examination, the defendant's brother, who was confined for a time at police headquarters, testified to a beating which he saw:

Q. (By the prosecutor) Who beat him [petitioner herein]?

A. (By Alfonso Escute) Susano, Diaz, all of them beat him.

Q. Five or six?

A. There were a lot of them and all beat him.

Q. In the face?

A. Anywhere.

Q. And they kicked him?

A. They beat him all over.

Q. In the face?

A. Yes, sir.

Q. In the abdomen?

A. Yes.

Q. Did they beat his feet?

A. They beat him all over.

Q. Had your brother been arrested when you got there?

A. Yes, sir.

According to detective Vega, the defendant confessed several times to the police in several different places. The key confession for trial purposes, the only written confession, was taken by an attorney for the prosecution. This government attorney who took the confession was clothed by Puerto Rican law at the time of this case with the power to conduct preliminary hearings and to admit the defend-

ant to bail. He was at the same time empowered to act as a prosecutor and develop evidence against an accused. In his testimony at the trial this prosecutor stated he began to take the confession of Escute between 4 and 4:30 p.m. in the afternoon of July 21, 1943 (the defendant appears to have been in custody at that time for at least five hours). Although the confession was a relatively short one, the prosecutor's testimony reveals that he did not complete taking it until 8 p.m. that night.

The gist of the confession asserted that the defendant fell under the influence of a citizen called "The Pulga" on July 16, 1943. The confession then recited that they, petitioner and The Pulga, walked along a beach aimlessly for a time, sat down, and The Pulga decided to rob a man on the beach. Young Escute was sent to a street corner to watch out, and after he arrived at the appointed corner he looked around to see The Pulga hit the intended robbery victim with a pipe. Thereafter Escute tried to take the pipe which was used in the beating away from The Pulga. At the outset of the confession, Escute was advised by the prosecutor-magistrate that he was accused of first degree murder along with The Pulga. He was further informed that he had a right to refuse to testify and that in order for his testimony to be admissible it must be "spontaneous, free from duress, threats and intimidation." The confession of the accused, who was placed under oath during the examination by the prosecutor-magistrate, recites petitioner's agreement that the confession was spontaneous and "free from intimidation." The examining prosecutor's trial testimony admits that the accused was never advised of a right to counsel, nor was the defendant informed of any right to see friends or relatives. Testimony that a relative had come to see and visit with him and was frustrated in this attempt was introduced by the defense.

The jury was given the written confession (secured by the examining prosecutor-magistrate) under a procedure similar to that which previously prevailed in New York State. This New York procedure was subsequently invalidated by this Court in *Jackson* v. *Denno*, 378 U. S. 368 (1964). The Puerto Rican procedure for handling confessions at the time of Escute's original trial was explained in *People* v. *Fournier*, 77 P. R. R. 208, 244 (1954): ". . . if the evidence as to voluntariness is conflicting, the trial court does not pass on its admissibility. Instead, the jury is recalled, the testimony as to voluntariness is repeated in its presence, and the confession is submitted to the jury." Since the testimony as to voluntariness was conflicting in petitioner's case here, this procedure was followed and the jury returned a verdict of guilty. The defendant was sentenced to life imprisonment, which sentence he continues to serve. He is presently confined in the penitentiary of the Commonwealth of Puerto Rico.

The petitioner appealed his conviction, attacking on constitutional grounds the government's denial of counsel at the prosecutor-magistrate's hearing wherein the confession was taken, as well as the procedures and rulings by the trial court attendant upon submission to the jury of the confession against him. *People* v. *Rivera*, 66 P. R. R. 207, 210-11 (1946). The Supreme Court of Puerto Rico asserted that the Puerto Rican Penal Code set up a statutory presumption that all persons are presumed of sound mind who are neither idiots or lunatics. Although expert trial proof that the defendant was so mentally deficient he couldn't understand his constitutional rights, much less waive them, was *not* rebutted by any expert testimony by the government, the Puerto Rico court ruled defendant's live expert testimony did not overcome the statutory presumption. 66 P. R. R. at 209-10. Hence, defendant's right

not to incriminate himself was deemed to be apprehended and appreciated by the accused because of a statutory presumption.

Further, as for the trial court's submission of the confession to the jury, the Puerto Rico Supreme Court pointed out that the trial judge "duly instructed the jury as to the latter's duty to reject it if, after considering the evidence regarding the alleged coercion, they should reach the conclusion the confession had not been voluntarily made." 66 P. R. R. at 210-11.

Subsequent to this decision on appeal, the Puerto Rican statute authorizing prosecutors to act as examining and committing magistrates was revoked.[1] Petitioner thereafter renewed his attack on his imprisonment, asserting that the confession which caused his conviction was taken at a time when prosecutors had overreaching power—that of both investigator and judge. Under such circumstances an accused was entitled to the advice of counsel during an accusatory hearing designed solely to secure evidence from him, he urged. See, *e.g., Escute* v. *Delgado,* 92 P. R. R. 746, 763 (1965). Unsuccessful, he turned to the federal court and filed the petition for federal habeas corpus which ultimately gave rise to the instant petition. In his petition for federal habeas relief below, petitioner established that he had exhausted state remedies and urged that federally guaranteed rights had been violated by unconstitutional practices which resulted in his confinement. However, the United States District Court, in an order dated June 23, 1970, denied relief. See Appendix A, *infra.* In denying relief the District Court pointed out that the Supreme Court of Puerto Rico created its own *Escobedo* doctrine in the 1965 appeal of the very petitioner involved in this case, then refused to apply it to him ". . . in spite of the fact that he timely raised the point long before any-

1. See Appendix A, footnote 1, *infra.*

thing like *Escobedo* ever came before the Supreme Court of the United States.'"[2]

On appeal from this order to the Court of Appeals below, petitioner vigorously asserted the unconstitutionality of the proceedures surrounding his trial. Among other points, the petitioner urged that *Coleman* v. *Alabama,* 399 U. S. 1 (1970), with its emphasis on the right to counsel at preliminary hearing, mandated relief. Petitioner argued forcefully that he was placed under arrest, beaten, confronted by a prosecutor who was also a judge under local law and empowered to authorize petitioner's pretrial release on bail.[3] The prospects for overreaching the accused in this situation are apparent, petitioner argued. Depending on his responses, defendant might or might not be given pretrial freedom by his interrogator.

Petitioner further urged the holding of the *Coleman* case to the effect that a proceeding wherein release of an accused on bail potentially emanates from such proceeding marks that proceeding as critical; thus, petitioner argued, the pretrial meeting between Escute and the prosecutor was a critical stage entitling Escute to counsel. The respondent nowhere mentioned the *Coleman* case in respondent's Court of Appeals brief. However, the Court below dedicated several paragraphs of its decision to rebutting petitioner's *Coleman* arguments, all pursuant to denying the petitioner the relief he requested.[4]

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2. See the final two paragraphs of the U. S. District Court Order, Appendix A, *infra.*

3. A most valued right for any defendant, as set forth in numerous decisions of this Court. See *Stack* v. *Boyle,* 342 U. S. 1 (1951).

4. The decision of the Court of Appeals is set forth in Appendix B, *infra.* The index to petitioner's brief before the United States Court of Appeals below reflects citation to the *Coleman* case at 16 separate pages of petitioner's appellate brief. *Coleman* and its implications were carefully discussed by petitioner. As indicated above, the case was not cited or discussed in the responding brief filed by the government in the court below.

REASONS FOR GRANTING THE WRIT.

1. In respondent's *Return to the Order to Show Cause* filed in the United States District Court for the District of Puerto Rico on January 23, 1970, respondent admitted:

> It is true that from 1902 to July 25, 1952, district attorneys in Puerto Rico were magistrates with power to determine probable cause, to issue warrants of arrest and to fix and take bail. *People* v. *Fournier*, 77 P. R. R. 208 (1945).[5]

Petitioner Escute's chance for pretrial freedom rested with the prosecutor-magistrate. The officer confronting him at the interrogation hearing, the prosecutor, held the keys to the jail. It appears that he could release Escute on his recognizance, set a low cash bail, or deny pretrial freedom entirely by setting bail in a substantial amount and requiring sureties. When such awesome power, power frequently reserved for purely judicial officers, is reposed in an interrogator, the interrogator cannot carry out a constitutionally supportable interrogation in the absence of representation (or at the very least the offer of representation) for the subject of the interrogation. It is undisputed here that neither representation nor offer of same was presented the accused, a man of deficient mentality to start with.

The adversary system of justice, especially where life or liberty are at stake as in a criminal case, depends upon

5. In addition, see Section 44a, Puerto Rico Code of Criminal Procedure (1935), set forth in this petition *supra* at p. 2. Section 373 of the P. R. Code provided for admission of defendants to bail before conviction. Apparently the only historical exception to this principle had been the capital case, but even there bail was only denied when the proof was evident or the presumption great. The repeal of capital punishment in 1929 impliedly repealed this exception to the right to bail. See Code of Criminal Procedure of Puerto Rico p. 262, note (1) (1935).

a distinct separation of the functions of prosecutor/investigator and judge. Mr. Justice Black articulated this fundamental principle in *In Re Murchison,* 349 U. S. 133, 137 (1955). Petitioner here has been victimized by a blending of the two roles in one man, and it appears clearly in the interest of administration of justice to separate the concepts with a decisive decision by this Court. The prospects for overreaching an accused person where he is set upon by a prosecutor-judge-interrogator are frightening indeed.[6]

One misapprehension by the Appeals court below should be cleared. The appellate opinion below pointedly asserted that in his original appeal from conviction the petitioner urged that he was denied a preliminary hearing; it would appear that what the court below is suggesting by this reference is that petitioner has more recently changed ground by now urging that a variety of hearing was held and petitioner was unconstitutionally denied counsel at same. A glimpse at the first appellate opinion in this entire case demonstrates the fallacy of any such implicit suggestion, as well as the consistency of the petitioner's position over the years. *People* v. *Rivera,* 66 P. R. R. 207, 211 (1946), the original direct appeal from the conviction, states:

> In his third assignment the appellant urges that the lower court erred in holding that the accused was not deprived of his constitutional and statutory right to be assisted by counsel *during the preliminary examination.* (Emphasis added.)

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6. Of additional interest is the problem of fairness to the prisoner. If the principles of sound decision-making enunciated in *Stovall* v. *Denno,* 388 U. S. 293 (1967) are constitutionally ordained, then the Supreme Court of Puerto Rico could not on the one hand create a new *Escobedo* doctrine, then on the other leave out of its scope the very prisoner in whose case the doctrine was announced. See the final two paragraphs of the United States District Court decision set forth in Appendix A, *infra.*

2. Untreated in the opinion of the Court of Appeals below was a point pressed by petitioner during oral argument there. At the time of petitioner's 1944 trial, Puerto Rico adhered to the old New York procedure of transmission of a confession to the trial jury. This procedure was amply described in *People* v. *Fournier*, 77 P. R. R. 208, 244 (1954), which points out that if there is any conflict in the trial evidence as to voluntariness, the confession is automatically submitted to the jury.[7] Such was precisely the pattern followed by the trial court in the case of petitioner here: "The lower court admitted the confession as evidence in the case and duly instructed the jury as to the latter's duty to reject it if, after considering the evidence regarding the alleged coercion, they should reach the conclusion that the confession had not been voluntarily made. The jury resolved the conflict in evidence against the defendant and there is no reason which might lead us to conclude that the court erred." *People* v. *Rivera*, 66 P. R. R. 207, 210-211 (1946). This old New York-type procedure was specifically outlawed in *Jackson* v. *Denno*, 378 U. S. 268 (1964).

Ruiz v. *Delgado*, 359 F. 2d 718, 723 (1st Cir. 1966) treated the question of whether Federal due process of law permits something different in the treatment of accused persons in Puerto Rico, and something different in the states of the United States. Judge Aldrich clearly set forth the applicable principle: "[S]ome uniform concept

7. *People* v. *Fournier* points out that the Puerto Rico procedure was substantially that followed in New York. Note 7 to the *Fournier* opinion observes that there are at least two other rules: "First, many states and apparently the Federal courts have adopted the so-called 'humane rule' under which the trial court is required to make an affirmative finding on conflicting evidence as to voluntariness. . . . Second, the 'orthodox rule' requires the trial court to determine finally and definitively whether a confession was involuntary. . . ."

of federal due process is guaranteed to all citizens of the United States."

One such fundamental due process guarantee, a right which has been ruled fully retroactive,[8] is the right to have the voluntariness of a confession tested in a constitutionally-approved procedure. Mr. Justice White stated it very well in summarizing the practices employed by the trial court in *Jackson* v. *Denno*, 378 U. S. 368, 377 (1964): "In our view, the New York procedure employed in this case did not afford a reliable determination of the voluntariness of the confession offered in evidence at the trial . . . and therefore cannot withstand constitutional attack under the Due Process Clause of the Fourteenth Amendment." It was this unreliable and unconstitutional procedure which was employed to test the challenged confession of the defendant at his 1944 trial.

This Court has recently addressed itself to the *Jackson* v. *Denno* problem in *Procunier* v. *Atchley*, 91 S. Ct. 485 (1971). The latter case makes the point that historical facts sufficient to render a confession involuntary must be asserted by a petitioner seeking *Jackson* v. *Denno* relief. Prisoner Atchley did not do this; however, no similar problem exists in the instant case. The facts asserted at the 1944 trial by petitioner respecting his 8-year-old mentality, fourth grade education, physical beatings inflicted upon him, custody in a cage in a room of detectives, and his interrogation by a trained lawyer clothed with magisterial powers have been touched upon only briefly here; they all bear heavily, and petitioner submits decisively, on the point at issue.

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8. See footnote 20 to *Linkletter* v. *Walker*, 381 U. S. 618, 639 (1965).

CONCLUSION.

The method by which the trial jury here received the defendant's confession, a confession which petitioner urges was involuntary, added greatly to the prejudice already suffered by the petitioner. Of deficient mentality and with an easily-influenced will, petitioner was ready prey for suggestion. Interrogation by a trained attorney, empowered by local law to administer oaths, added to the coercive effect. The decisive evidence in this case was the product of this interrogation, an interrogation which was conducted not by police officers buy by a lawyer. Aside from the serious ethical considerations in such a confrontation,[9] there was the further problem that the interrogator had full judicial authority to release the defendant on bail after the interrogation. The accused was sworn as a witness by the prosecutor-magistrate. Notwithstanding indications by the Court of Appeals below that the prosecutor may not have intended to act in his role as judge, scant attention has been given the perceptions of the accused. Whatever the intent of the prosecutor, it must have appeared to the defendant that he was in a judicial proceeding. Some tacit recognition that the prosecutor was acting as a magistrate appears in the court opinion below. "[W]e see no factual prejudice resulting to this petitioner from the absence of counsel at the interrogation by the *magistrate.*"[10]

9. Canon 9 of the ABA Canons of Professional Ethics (1965 ed.) provided that when a *lawyer* dealt with an unrepresented person "he should not undertake to advise him as to the law." That such advice was given by a prosecution lawyer to the unrepresented accused in this case is clear from the face of the confession; it is also clear that such advising on the law occurred after the investigation had passed to the accusatory stage and the government's lawyer was concerned primarily with building evidence against the accused.

10. (Emphasis added.) See this text statement which appears as the last statement in the Court of Appeals opinion, Appendix B, *infra.* See also Section 13, Code of Criminal Procedure of Puerto Rico (1935) set forth in this petition on p. 2 *supra.*

To the contrary, the prejudice inherent in such a situation appears obvious. The fact that in the years since 1952 prosecutors have been stripped of their powers as magistrates is of little consequence to petitioner; he was the victim of a system fraught with the potential for overreaching, a system which was wisely repealed in 1952. And in the years when this system operated, there appears little question that the stage wherein such prosecutor-magistrate examinations as witnessed in the instant case occurred was a most crucial one for the accused. Of deficient mentality, unable to comprehend the prosecutor's technical words, confined in a cage after arrest, a frightened young person was interrogated. The elements of coercion were strong. The fruit of this unconstitutional interrogation, the confession, was destructive of petitioner at his trial.

A final consideration is the fact that petitioner's conviction dates to 1944. He has diligently attacked the procedures used by the government to achieve it since that time. In the situation of old judgments like this, the hardship on the prosecution wrought by any court decision ordering retrial of the defendant must be balanced against the unfairness of confining an accused under a 27-year-old conviction achieved by constitutionally defective procedures. Nowhere was this principle better apprehended or more ably expressed than in Mr. Justice Blackmun's statement in *Johnson* v. *Bennett*, 414 F. 2d 50, 57 (8th Cir. 1969):

> The State of Iowa, of course, as with Stump, is entitled to a reasonable time to retry Johnson for the crime with which he has been charged. We realize that in Johnson's case, with the passage of 35 years, more so than in Stump's, there is little likelihood of the state's ability to retry. Witnesses probably are gone and memory undoubtedly has dimmed. To the extent the time factor has dampened the state's ability

to retry it also serves to increase the injustice done to Johnson if, by chance, he is innocent of the crime of which he was accused.

For the reasons stated herein, petitioner respectfully prays this petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the District of Puerto Rico.

FERNANDO RIVERA ESCUTE,
Petitioner,
vs.
GERARDO DELGADO, Warden, Penitentiary of the Commonwealth of Puerto Rico,
Respondent.
Civil No. 884-69.

OPINION AND ORDER.

The matter is before us on a petition for a writ of habeas corpus filed on December 29, 1969, in which it is alleged that for the reasons therein stated, petitioner should be released from the custody of respondent, the Warden of the Penitentiary of the Commonwealth of Puerto Rico. The grounds as set forth by petitioner are the following:

1. Because, having the petitioner raised at his trial and on appeal the inadmissibility of his confession on the ground that it was obtained by the District Attorney, acting as a committing magistrate under Article 44 of the Code of Criminal Procedure of Puerto Rico[1] and the jurisprudence of the Supreme Court of Puerto Rico, said confession was inadmissible in evidence for having been elicited without the aid of counsel, without petitioner having been advised of such constitutional right, and without petitioner having waived said right expressly and intelli-

1. The statute authorizing this procedure has since been repealed. Constitution of the Commonwealth of Puerto Rico, Article II, Section 10; *López* v. *Superior Court*, 1956, 79 P. R. R. 470.

gently, as later set forth by the Supreme Court of the United States in the cases of *White* v. *Maryland*, 373 U. S. 59 (1963) and *Arsenault* v. *Massachusetts*, 393 U. S. 5 (1968) and *Pointer* v. *Texas*, 380 U. S. 400 (1965).

2. Because, assuming that the District Attorney was not acting as committing magistrate under Article 44 and the jurisprudence of the Supreme Court of Puerto Rico when eliciting petitioner's confession, and that he was just acting as prosecutor, policeman, or detective, the confession so obtained was still inadmissible under the doctrine of *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), which is applicable to petitioner irrespective of its having been established after the final disposition of his case, inasmuch as petitioner had raised at the trial on the merits and on appeal the question of inadmissibility of his confession on the ground that he had been deprived of his right to legal counsel. Thus, no question of retroactivity or prospectivity should arise with respect to the applicability of the *Escobedo* doctrine to petitioner's case.

3. Because denial of the *Escobedo* doctrine to petitioner is then a clear miscarriage of justice, and the reversal of the judgment against him through habeas corpus lies under 28 USCA 2241 as now interpreted by the Supreme Court of the United States and federal courts in the following cases: *Sunal* v. *Large* 332 U. S. 174 (1947); *Hill* v. *United States*, 368 U. S. 427 (1962); *Sanders* v. *United States*, 373 U. S. 1 (1963); *Kaufman* v. *United States*, 394 U. S. 217 (1969); *Kulick* v. *Kennedy*, 157 F. 2d 811 (1946); *In re Jackson*, 393 F. 2d 420 (1964); *United States* v. *Sobell*, 314 F. 2d 314 (1963); *Brown* v. *Allen*, 344 U. S. 443 (1953); *Desist* v. *United States*, 394 U. S. 244 (1969). (See dissenting opinion of Justice Harlan in this case, at pages 256, 394 U. S.)

4. Because, having petitioner been arrested unlawfully by police officers without probable cause that he had com-

mitted any crime, and having the State failed to justify the legality of his arrest at trial, the confession exacted from him was the product of an unlawful arrest under the cases of *Wong Sun* v. *United States,* 371 U. S. 471 (1963) and *Kaufman* v. *United States, supra.*

5. Because establishment by the Supreme Court of Puerto Rico of the rule of law of *Escobedo* v. *Illinois* in petitioner's own case, but with prospective application only, is in conflict with Article III of the Constitution of the United States as construed in the case of *Stovall* v. *Denno,* 388 U. S. 293 (1967), which, furthermore, constituted a suspension of the writ of habeas corpus forbidden by Article I, section 9, subsection 2, of the Federal Constitution, amounting, likewise, to the deprivation of petitioner's liberty in violation of the Due Process Clause of the Fifth Amendment to the Constitution, as well as a violation of the Eighth Amendment to the same. *Trop* v. *Dulles,* 356 U. S. 86 (1957).

An order to show cause issued, respondent filed a return to the petition, petitioner filed his traverse and, after oral argument, the cause was submitted to this Court together with extensive briefs by both parties.

The Court wishes at this point to say a word about Mr. Santos P. Amadeo, attorney for petitioner, and his indefatigable efforts on behalf of this petitioner. It was he who defended petitioner at this trial and he who took the case on appeal. It is he who, through successive legal proceedings throughout the course of more than 25 years, of which this case is no mean example, has attempted to secure his release, in the process setting legal precedents for future criminologists and students of constitutional law. Such dedication to justice and fairness deserves note by our courts and should serve as inspiration to succeeding generations of freedom-minded attorneys.

Turning now to the case before us, the Court believes that the issues in this case are reduced to one, namely, whether one who has unsuccessfully raised a constitutional point at trial, on appeal, and in collateral attacks on his conviction, is entitled as a matter of law to application of a new constitutional doctrine resolving the point in his favor, where the new rule is first stated in one of his own attempts to secure release in the State court.

Petitioner correctly states that the problem is not one of mere retrospective application of the new doctrine. This case is complicated by the fact that petitioner had unsuccessfully raised the very point now accepted as the new rule at both his trial and on appeal. For the reasons which follow, however, we feel that this circumstance does not change petitioner's standing *vis a vis* the new rule.

Petitioner was sentenced on January 26, 1944 to life imprisonment after being convicted by a jury of first degree murder. His conviction was affirmed on appeal. At the trial, petitioner objected to the admission into evidence of his confession, on the ground, as previously stated, that it was taken from him without his having been informed of his right to counsel in the preliminary investigation. The Supreme Court of Puerto Rico ruled adversely to petitioner on this point on appeal. In 1958, he raised the point in a habeas corpus proceeding in the Commonwealth courts, but his petition was again rejected by the Supreme Court of Puerto Rico, which distinguished the case of *In re Groban*, 352 U. S. 330 (1957), on which he had originally based his case, and the cases of *Crooker* v. *California*, 357 U. S. 443 (1958) and *Cicenia* v. *La Gay*, 357 U. S. 504 (1958), which were decided while his petition was before the Commonwealth Supreme Court, and which petitioner cited in a supplemental brief thereto. Finally, in 1965, in another petition for writ of habeas corpus filed by petitioner in the local courts, the Supreme Court of Puerto

Rico overruled its prior jurisprudence in the area, particularly its reasoning in petitioner's appeal from conviction, and, in the case of *Rivera Escuté* v. *Delgado,* 92 P. R. R. 746 (1965), established in Puerto Rico the doctrine enunciated by the United States Supreme Court in *Escobedo* v. *Illinois,* 378 U. S. 478 (1964). However, in so doing, it refused to apply the new rule retroactively to petitioner himself, and denied his petition. The Puerto Rico Supreme Court found authority for its refusal in Justice Clark's opinion in *Linkletter* v. *Walker,* 381 U. S. 618 (1965).

As stated above, petitioner claims that the Puerto Rico Supreme Court's ruling is unconstitutional. As a matter of fact, however, petitioner has admitted both in his traverse and in his brief of December 29, 1969 that a state court may, in its discretion, refuse to apply its new rule to the parties of the case before it. This is what the Puerto Rico Supreme Court did in *Rivera Escuté* v. *Delgado, supra.* Exercising this discretion, one way or the other is not our prerogative. It is only in the province of the Court that sets out what is to be the law, in this case, the Supreme Court of Puerto Rico. That Court used its discretion in a specific manner. We are not at liberty to disturb its holding in this respect. In fact, as a matter of law, we do not have the authority to pass on the highest Commonwealth Court's action.

There is one collateral, though very important, issue that must be discussed. Petitioner is asking this Court, *qua* federal court, to apply directly to him the *federal* constitutional doctrine of the *Escobedo* case. This is to be distinguished from asking us to hold the Supreme Court of Puerto Rico in error for having refused to apply *its* new constitutional doctrine, announced in *Rivera Escuté* v. *Delgado,* to petitioner. Whether to apply or not to apply its new constitutional doctrines retroactively, or even to the case in which they are announced, is, as we have seen,

a discretionary matter with the Puerto Rico Supreme Court, as it is with any State court.

We hereby take notice of the following pronouncements by the Supreme Court of Puerto Rico. In *Rivera Escuté* v. *Delgado,* it said:

> "It is a historical fact that the Federal Constitution, even under the previous systems of delegated powers, has not governed in Puerto Rico by its own force and effect, nor were its provisions . . . extended by congressional action to be effective here directly." 92 P. R. R. at 755.

And then, after a quotation from *R. C. A.* v. *Government of the Capital,* 91 P. R. R. 404 (1964), it concluded:

> "Thus, even if the Sixth Amendment may not by itself govern in Puerto Rico, and even if we are not one of the fifty states of the Union, the Commonwealth of Puerto Rico, by reason of the foregoing, should enjoy in its full force the enlarged protection guaranteeing the right to have assistance of counsel afforded by Escobedo v. Illinois, 92 P. R. R. at 756."

As it can readily be seen, the *Escobedo* and similar doctrines are not applied in Puerto Rico, as they are in the States of the Union, as emanating from the Federal Constitution. On the contrary, and thinking now of our case, it was the Supreme Court of Puerto Rico, interpreting the Constitution of the Commonwealth, that created, or rather, adopted, its own Escobedian doctrine. And, in so doing, it chose to apply it prospectively, leaving out of its scope even the defendant in whose case the doctrine was announced—petitioner herein—in spite of the fact that he timely raised the point long before anything like Escobedo ever came before the Supreme Court of the United States.

We are called to apply the new doctrine to this petitioner. That we cannot do. We might disagree with the wisdom of the Commonwealth Supreme Court policy regarding the way in which it applies its new doctrines, but we are not at liberty to disturb it.

Therefore, the petition is hereby denied.

IT IS SO ORDERED.

San Juan, Puerto Rico, June 23, 1970.

/s/ HIRAM R. CANCIO,
Hiram R. Cancio,
Chief Judge.

APPENDIX B.

UNITED STATES COURT OF APPEALS

For the First Circuit

No. 7660.

FERNANDO RIVERA ESCUTE,
PETITIONER, APPELLANT,

v.

GERARDO DELGADO, WARDEN,
PENITENTIARY OF THE COMMONWEALTH
OF PUERTO RICO,
RESPONDENT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

OPINION OF THE COURT.

March 10, 1971

COFFIN, *Circuit Judge*. Petitioner appeals from the denial by the District Court for the District of Puerto Rico of a petition for habeas corpus. At present, he is serving a sentence of life imprisonment for a conviction of first degree murder arising out of a crime committed in 1943.

Petitioner unsuccessfully appealed his conviction to the Supreme Court of Puerto Rico, *People* v. *Rivera Escute*, 66 P. R. R. 207 (1946), sought a writ of habeas corpus in the Puerto Rican Supreme Court, *Rivera Escute* v. *Delgado*, 80 P. R. R. 800 (1958), appealed the denial of that petition to this court, *Rivera Escute* v. *Delgado*, 282 F. 2d 335 (1st Cir. 1960), *cert. denied*, 365 U. S. 882, and initiated another unsuccessful petition for habeas corpus in the Puerto Rican courts, *Rivera Escute* v. *Delgado*, 92 P. R. R. 746 (1965). In all of these proceedings petitioner, ably assisted by original counsel appointed in 1943, raised the constitutionality of a confession he made to a prosecutor shortly after he was apprehended. Although petitioner was told of his right to remain silent and that any statement could be used at trial, the prosecutor did not advise petitioner of his right to have counsel attend the interview.

In his 1965 petition to the Puerto Rican Supreme Court, petitioner was successful in persuading the court to adopt the doctrine of *Escobedo* v. *Illinois*, 378 U. S. 474 (1964), but the court refused to give the new doctrine retroactive effect. Petitioner argues before this court that the failure to apply the new doctrine to his case was error. The Supreme Court held in *Johnson* v. *New Jersey*, 384 U. S. 719 (1966), that neither *Escobedo* nor *Miranda* v. *Arizona*, 384 U. S. 436 (1966), was to be applied retroactively. It would seem, therefore, that there is no constitutional reason that would compel the Puerto Rican Supreme Court to apply *Escobedo* to petitioner's 1943 confession.

Petitioner argues, however, that the 1965 Puerto Rican case was not merely the application of the federal law as expressed in *Escobedo* to Puerto Rico, but rather that the Puerto Rican court was applying the Puerto Rican constitution and was using the *Escobedo* opinion as an analogous precedent. He argues further that in habeas corpus cases, the Puerto Rican Supreme Court has the same status as

a United States district court, that a United States district court cannot, because of the case or controversy requirement, create new law without applying it to the case under consideration, and that the ruling in the 1965 case must therefore apply to petitioner. Petitioner does not argue that the Puerto Rican courts are Article III courts and hence bound by the case or controversy requirement of the United States Constitution, *cf. Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932), except in habeas corpus cases. Habeas corpus cases are different, he says, because 48 U. S. C. § 872 gives Puerto Rican courts the power to grant writs "in all cases in which the same are grantable by the judges of the district courts of the United States. . . ."

We cannot understand how this statutory authority granted by Congress in the exercise of its powers over territorial possessions converts the Puerto Rican courts into federal Article III courts in habeas corpus cases only. Such a ruling would have the anomalous effect of preventing the Commonwealth courts from giving solely prospective effect to cases depending upon the random factor of how the cases came before the court. Moreover, the grant of power does not say that the Puerto Rican courts' authority to issue writs of habeas corpus is limited in exactly the same way that district courts' power is by the case or controversy requirement. The grant of subject matter jurisdiction to decide cases of persons who claim that they are unlawfully imprisoned, does not imply that the courts have no power to issue advisory opinions in those cases. The authority of the Puerto Rican Supreme Court to give only prospective effect to its rulings is dependent on the power granted that court by the Puerto Rican constitution, and that court is the authoritative interpreter of that constitution. We may sympathize with petitioner who has urged the issue of right to counsel at interrogations for so many years only to be

denied the benefits of his efforts, but we cannot say that the Puerto Rican Supreme Court had no authority to issue a prospective ruling.

At oral argument, petitioner stressed an additional point. The interview at which petitioner made his confession was sometimes referred to in the record as a "preliminary examination". Recently, the Supreme Court has ruled that a "preliminary hearing" is a critical stage of the prosecution at which the defendant's right to counsel attaches. *Coleman* v. *Alabama,* 399 U. S. 1 (1970). Although the Court has not yet faced the issue whether *Coleman* is to be given retroactive effect, it has given retroactive effect to several similar opinions in which it held that denial of the right to assistance of counsel would almost invariably deny a fair trial. These stages of the prosecution include the trial itself, some forms of arraignment, and appeal. *Stovall* v. *Denno,* 388 U. S. 293, 297 (1967). It seems likely therefore that *Coleman* also applies retroactively. Thus, if the prosecutor's interrogation in this case is a "preliminary hearing" within the meaning of *Coleman,* petitioner would be entitled to the relief he seeks unless the absence of possible prejudice was clearly established. *Coleman, supra* at 10-11.

Normally, prosecutorial interrogations, while governed by *Escobedo* and *Miranda,* are not considered preliminary hearings. A preliminary hearing, such as the Alabama procedure at issue in *Coleman,* seeks to determine if there is sufficient probable cause to allow the state to bring the accused to trial. *Coleman, supra* at 8 n. 3. Under a Puerto Rican statute which has been repealed since 1952, but which was in effect when petitioner was interrogated, Puerto Rican prosecutors were magistrates with the power to determine probable cause, to issue warrants of arrest, and to fix and take bail. *Rivera Escute* v. *Delgado,* 282 F. 2d 335, 338 (1st Cir. 1960). Petitioner argues that at the time of his interview, the prosecutor was performing in his magis-

terial capacity and that the interview was therefore a preliminary hearing within the meaning of *Coleman*.

All confrontations between prosecutors and defendants were not, of course, preliminary hearings. From our examination of the record, we have determined that the prosecutor was not acting in his magisterial capacity when petitioner confessed. The only support for petitioner's claim is that the prosecutor possessed magisterial powers and that the prosecutor placed him under oath before he took his statement. There were no other witnesses examined*; there was apparently no bail set; the prosecutor apparently did not issue a warrant of arrest, petitioner having been earlier arrested and in custody; and there is no suggestion or evidence that the prosecutor made a formal determination of probable cause. That the proceeding was merely part of the investigation is not only indicated by contemporary references at the trial, but demonstrated by events. Petitioner had been taken into custody and had made several similar oral confessions to the police before the prosecutor was called in. The prosecutor appeared with a secretary and immediately issued warnings and commenced the questioning appearing in the written statement. The formal questioning began in the Detective Bureau Headquarters, was suspended while the petitioner led the prosecutor to various places in retracing his activities on the day of the crime, and was resumed and completed at the Lofza Street Police Station. Furthermore, on his original appeal and when petitioner made his first attempt to secure a writ of habeas corpus, he apparently argued that his conviction was improper because he had been denied a preliminary hearing. The Puerto Rican Supreme Court on two occa-

* One witness, Pacheco, stated that he testified under oath before the prosecutor on an occasion when petitioner was in another room. There is no suggestion that this occurred in connection with the questioning of petitioner.

sions and this court on appeal held that his conviction was proper even though he had been prosecuted on an information which had *not* been recorded by a preliminary hearing conducted by the district attorney. *See People* v. *Rivera Escute,* 66 P. R. R. 207, 211 (1946); *Rivera Escute* v. *Delgado,* 80 P. R. R. 800, 813-14 (1958); *Rivera Escute* v. *Delgado,* 282 F. 2d 335, 338-39 (1st Cir. 1960). That petitioner's confrontation by the prosecutor was merely an interrogation and not a preliminary hearing is clearly established. Thus, the doctrine of *Coleman* does not apply to this case.

Even if the interrogation had taken place at a preliminary hearing, we would be inclined to reach the same result. In *Coleman* the Supreme Court pointed to four factors which prompted it to decide that the accused needed the presence of an attorney. The attorney might point out flaws in the state's case by examining witnesses, might obtain impeachment evidence or preserve favorable testimony for trial, might discover the state's case, and might make effective arguments for lower bail or the necessity of an early psychiatric examination. Clearly the first three factors would have benefited this defendant not at all since there were no other witnesses at the examination but himself. We are inclined to doubt the ability of a defense lawyer to persuade a magistrate to lower bail when the magistrate is also the prosecutor. Petitioner obtained a psychiatric examination before trial, and there was no prejudicial delay, the trial having taken place six months after petitioner's arrest. In short, it would seem that the presence of a defense attorney might have served only to prevent a confession at the examination, but even here, petitioner was not prejudiced. On at least three separate occasions before he confessed to the prosecutor he had confessed to various police officers. This court has already ruled that none of these confessions was coerced. *Rivera*

Escute v. *Delgado,* 282 F. 2d 335, 336 (1st Cir. 1960). Other than being denied the non-retroactive rights afforded by *Miranda* and *Escobedo,* we see no factual prejudice resulting to this petitioner from the absence of counsel at the interrogation by the magistrate. *Cf. Chin Kee* v. *Commonwealth of Massachusetts,* 407 F. 2d 10 (1st Cir. 1969), *cert. denied,* 395 U. S. 982.

Affirmed.